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Supreme Court of the Anited States

OCTOBER TERM 1971

Supreme Court, U.S. F I L E D

MAR 20 1972

MICHAEL RODAK, JR., CLERK

No. 71-829

LEILA MOURNING, Petitioner

v.

FAMILY PUBLICATIONS SERVICE, INC., Respondent

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF
OF AMIGUS IN SUPPORT OF PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the Anited States

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MOTION FOR LEAVE TO FILE BRIEF AS AMIGUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTICRARI TO THE UNITED STATES COURT OF APPRAIS FOR THE FIFTH CIRCUIT

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The National Conference of Commissioners on Uniform State Laws hereby respectfully moves for leave to file the attached brief amious ourise in this case. The consent of James Nabrit, Esquire, attorney of record for Petitioner, has been obtained. The consent of Robert S. Rifkind, Esquire, attorney for Respondent, was requested but refused.

The interest of the National Conference in this case arises from the fact that the Uniform Consumer Credit Code (UCCC), which the Conference drafted to be in harmony with the Truth in Lending Act (15 U.S.C. §§ 1601 et. seq.), applies to all consumer credit transactions in which,

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inter alia, either a finance charge is imposed or the debt is paid in multiple instalments (UCCC 66, 2.104 and 3,104). Moreover, UCOU 51 1.301 and 3.301 provide that compliance with Truth in Lending is the equivalent of compliance with the UCCC. The Board of Governors of the Federal Reserve System is directed to exempt from the applicability of Truth in Lending those states having laws substantially similar, and the Board has considered the UCCC disclosure provisions to be sufficiently similar to those of Truth in Lending to merit exemption. (15 U.S.C. § 1633) If the Fifth Circuit's rejection of the validity of the more-than-fourinstalments rule of Regulation Z (12 C.F.R. 6 226.2(k)) is allowed to stand, grave uncertainties arise concerning: (1) the status of the disclosure provisions of the UCCC as being sufficiently similar to those of Truth in Lending to qualify for exemption; and (2) whether in UCCC states creditors not separately stating a finance charge in multiple instalment esses need any longer comply with the disclosure provisions of the UCCC owing to UCCC \$5, 2,301 and 3,301. The National Conference believes that clarification of the status of the more-than-four-instalment rule is necessary at the highest judicial level in order that the Conference can continue its cooperation with the Board in providing American consumers with a uniform law of credit disclosure. the Mational Conference of Commissioners on Uniform

Respectfully submitted,

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LEILA MOURNING, Petitioner

FAMILY PUBLICATIONS SERVICE, INC., Respondent

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPRAIS FOR THE FIFTH CIRCUIT

SUMNER H. BABCOCK Bingham, Dana & Gould 100 Federal Street Boston, Massachusetts 02110 ALFRED A. BUEBGER WALTER D. MALCOLM WILLIAM D. WARREN Attorneys For Amicus National Conference of Commissioners on Uniform State Laws.

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BRIEF OF AMIGUS GURIAE IN SUPPORT OF PETITION FOR A WRIT OF GERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH GIRGUIT

L STATEMENT OF THE CASE

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This brief is submitted by the National Conference of Commissioners on Uniform State Laws as omicus curide in support of the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The interest of Amicus in this case is fully set forth in its attached Motion for leave to file this brief. The discussion which follows is confined to the issue of the validity of the more-than-four-payments rule of Regulation Z (12)

C.F.R. § 226.2(k)) as a proper exercise of the authority of the Board of Governors of the Federal Reserve System to present regulations to carry out the purposes of the Truth in Lending Act (15 U.S.C. § 1604).

The suit arose from a contract entered into between petitioner and respondent under which petitioner was to receive four magazines for 60 months in exchange for an initial payment of \$3.95 and 30 monthly payments of \$3.95. Respondent made none of the disclosures specified in the Truth in Lending Act (15 U.S.C. §§ 1601 et seq.) and Regulation Z (12 C.F.R. (226). The District Court held that since the contract was payable in more than four installments, it was a consumer credit transaction subject to the Act and that disclosures should have been made. The Fifth Orouit reversed and remanded with directions that the complaint be dismissed on the ground that the more-thanfour-payments rule of 12 C.F.R. § 226.2(k) was unconstitutional as in excess of the authority granted the Board of Governors of the Pederal Reserve System to prescribe regulating applementing the Truth in Lending Act (16 U.S.C. § 1604) 2 Mountag to Pamily Publications Service, Inc., 449 F.2d 235, CCH Consumer Credit Gulde 1 99,337 (5th Cir. 1971), rev'g CCH Consumer Credit Guide ¶ 99,632 (S.D. Fla. 1970).

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The Fifth Circuit's opinion in this case withdraws the substitutial protections of the Truth in Lending Act (hereafter referred to as the Act) (15 U.S.C. 9 1001 et seq.),
from consistent in all transactions in which creditors do

southers, land sales, leases, and the like) and is not separately disclosed. The Congressional mandate to the Board of Governors of the Federal Beserve System is to "prescribe regulations to carry out the purposes of" the Act is declared to be that of assuring consumers "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and to avoid the uninformed use of credit." (Emphasis added).

In implementation of this charge, the Board prescribed regulations requiring a statement of the terms of credit not only by those creditors who choose to state a separate finance charge but also by creditors who make no separate statement of a finance charge but who engage in credit transactions involving a substantial period of credit extension, i.e., where by agreement the contract is payable in more than four installments. (12 C.F.R. v 226.2(k)). By adoption of the more-than-four-installments rule the Board

See Johnson, The Uniform Consumer Credit Code and the Credit Problems of the Low Income Consumers, 37 GEO. Wash. L. Rev. 117, 1119 (1969); Junes, The Inner Cloy Marketplace: The Need For Law and Order, 37 GEO. Wash. L. Rev. 1015 (1969); Jordan and Watten, Disclosure of Finance Charges: A Rationals, 64 MICH. L. Rev. 1285, 1301 (1966); Kripke, Gesture and Reality in Consumer Credit Reform, 44 N.Y.U. L. Rev. 1, 6-7 (1969); Lynch, Consumer Gredit at Ten Percent Simple: The Arkensus Case, U. Of Itt. LF. 592, 606 (1968); Spanogle, How Much Truth in What Tends of Lending, 16 J. Pub. L. 296, 305 n.27 (1967); White, Consumer Gredit in the Ghettor UCCC Free Entry Provisions and the Rederal Trude Commission Study, 25 Bus. Law. 147 (1969); Comment, Consumer Protection in Michigan: Current Methods and Sons Proposals for Reform, 68 MICH. L. Rev. 926, 936 (1970); Comment, Consumer Legislation and the Poor, 76 Yale L.J. 745, 762 (1967).

extended full disclosure to virtually all consumer oredit transactions in which significant extensions of credit are present, thereby affording the American consumer a meanful basis not only for comparing transactions in which same charge is stated separately but also for comparing these transactions with other credit fransactions in which no finance charge is stated. In each instance the Board has given the consumer the advantage of knowing the number, amounts and due dates of payments, as well as the total amount of payments awad (12 C.F.R. § 226.8 (b)). Hence, the consumer can make an effective comparison between the cost of employing credit in cases in which a finance charge is separately stated and those in which it is not. Moreover, important information about eredit insurance, balloon payments, the amounts of additional fees and charges, and the existence of security interests (12 C.F.R. & 226.8(b) and (c)), as well as two of the Act's major substantive probections, those relating to advertising (15 U.S.O. & 1661 et seq.) and rescission (15 U.S.C. § 1635), are assured for all tion rather than only for those consumers fortunate to deal with creditors making separate disclosure of finance charges, H. W. Str. Street and the west what would

It would be incredible if the first major piece of consumer credit legislation enacted by Congress could be avoided merely by a creditor's choice of including his credit costs within the price of his product rather than stating them expectely.

Notitier the law, the Federal Reserve Board nor the courts are so simplistic as to believe that a person in the business of extending long term credit should be permitted in offset to abolish the Truth in Londing Act by instelly charging a single 'coast or credit' price incoming full well that the great bulk of its customers will never pay in less than, for example, thirty months." Strompolos v. Premium Readers Service, 362 F. Supp. 1100, 1108 (N.D. III., 1971)

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For creditors doing a substantial portion of their business on a cash basis, burying the finance charge would presumbly be discouraged by market pressures, but for the many creditors who do most or all of their business on credit the consequences of the decision whether to state or bury credit sosts in the price become substantial. If the choice of burying credit costs in the price of the product gives them elear exemption from Truth in Lending, this choice will be increasingly easy to make. Governor J. L. Robertson showed the Board's concern about this danger when he midt

"We believe that without this general provision [the more-than-four-installments rule] the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would be encouraged to a great extent by Truth-in-Lending. In order to prevent this ironic result we felt it imperative to establish the more than four payments rule." CCH Consumer Credit Guide ¶ 30,228.

In 15 U.S.C. § 1604 Congress enjoined the Board "to effectuate the purposes of this [Act], to prevent circumvation thereof, or to facilitate compliance therewith" by such regulations as are "necessary or proper" to accomplish these results "in the judgment of the Board." The loard has exercised its judgment responsibly to effectuate the purposes of this Act and to prevent seasion thereof by adopting the more-than-four installments rule. In so providing the Board resched the same conclusion as to the seed for credit disclosure as did the National Conference of Commissioners on Uniform State Laws which extended

the protections of its Uniform Communes Credit Code (hereafter referred to as the UCCC) not only to transactions in
which a finance charge was separately extend but also to
those in which the agreement called for multiple installments. (UCCC 45 \$406 and \$406). If there is any doubt
about the validity of the Roard's mere-than-four-installment rule, analy the interpretation of the agency desigacted by Congress to implement the Act, the Federal
Reserva theard, should be given great determore by virtue
of the "venerable principle that the construction of a
statute by those charged with its execution should be followed unless there are compelling indications that it is
wrong? (Red Lies Broadcasting Co. v. PCC, 395 U.S. 367,
281. (1909).) "particularly... when the administrative
practice at stake involves a contemporaneous construction
of a statute by the men charged with the responsibility of
setting its machinery is motion, of making the parts work
efficiently, and amouthly while they are yet untried and
new." Usull v. Tallesce, 380 U.S. 1, 18 (1965).

B. The December Brow Introduces Such Uncertainty Levo she Law of Consumer Center Disclosure as To Wasbart Chardication at the Highest Judicial Level.

The decision below not only stufficies with a well-reasoned district court opinion, Streengolos v. Prantom Rotalgra Service 226 F.Supe. 1300 (N.D. III. 1971). which concluded that the multiple installment rule in a reasonable univoide of the Board's authority; but also with the proplation of the UCOG which many envefully prepared to medicately the stat toward or ensurements a surform law of disalonary of credit/toward.

Now weeding before the Seventh Chicago on Interlocationy Appeal areas. House Seventh Chicago Chicago Miles. Record Seventh Chicago Chicago Miles. Record Seventh Chicago Chica

The UCCC was in preparation by the National Conferwhile Truth in Lending was being debated in Congress. committees and staffs preparing these measures shared as in a cooperative effort to effect better consumer protion legislation. The Congressional purpose in promul-Truth in Lending was to set federal standards for dit disclosure; if states met these standards, the Board as directed to exempt their laws from the Act and to allow anthorities to enforce their own disclosure laws. 15 U.S.C. § 1633). The disclosure provisions of the UCCC re carefully designed to meet the federal standards in order that states adopting the UCCC might qualify for comption by the Board. UCCC \$5 2.104 and 3.104 define, lively, consumer credit sales and consumer loans as inter alia in which either a finance charge is made or the debt is paid in multiple installments. It is fair to say at a nation-wide uniform law of consumer credit discloswas the shared objective of both the National Confersee and the Congress, and in pursuance of this the UCCC contains the following provision designed to assure intertate creditors that they might operate uniformly in all Contraction And Section 1 The Antique Server 1 The Antique Server 1 The Section 1 The confinency of authorizing projects the fore withing

Section 2.301 Sharanan ton via search seanth tong

(2) The seller shall disclose to the buyer to whom credit is extended with respect to a consumer credit sale the information required by either this Part, or the Federal Consumer Credit Protection Act.

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(3) For the purposes of subsection (2), information which could otherwise be required pursuant to the Federal Consumer Credit Protection Act is sufficient even though the transaction is one of a class of credit transactions exempted from that Act pursuant to regu-

Change of Alba. Beard, and Gamerners, and the Fodoral Paceurs Christian and all and an activities and religious Southout 5:007 Whitmak's for the higher and accompany of the continuous subtant production and the active substitution in the second

es the position of the Firth Circuit in the court below

(1) In UCCO states (correctly Obtorate, Islaho, Indianal Obtainant Utait, and Wyoming), creditors not opting to state separately a master charge may successfully consent that since they need not comply with Truth in Lending the UCCO providion quoted above exempts them from having to comply with the disclosure provisions of the UCCO; namely even in the UCCO states consumers would be desired to protection of disclosure legislation in the cases in which master charges are buried.

(2) If the distriction in (1) above to not sustained, there will be a distriction in (1) above to not sustained, there will be a distriction in (1) above to not sustained, there will be a distriction in (1) above to not sustained, there will be a distriction in (1) above to not sustained, there will be a continue to water factor in the UCCO states from that obtaining in sustain with it contour to the Pirth Chronic a interpretation of Truth in Lending and thus to withdraw modification of Truth in Lending and thus to (I) In UCCC states (currently Oblorado, Idaho, Indi-

distant moult distance protection in transactions in

tich finance charges are not separately stated of the (3) States unacting the UOCO may no longer have laws militared substantially similar to Truth in Leading and sy, therefore, not qualify for exemption pursuant to USAC 1 form

C. The Distance Bridge 10 AS Business This course in the Constitution of the Constitut

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the consumer will be able to compare more readily the various credit terms available and avoid the uninformed se of credit." (15 U.S.C. § 1601) (emphasis added): The let defines "creditor" as referring to creditors who regularly extend or arrange "predit for which the payment of a finance charge is required..." (15 U.S.C. § 1602(f)). It is well known that some creditors choose to bury their hance charges in the price of their product. In order to deal with this practice, which probably bears most heavily on the low-income consumer, the Board, in pursuance of its authority to assure meaningful disclosure of credit terms and "To prevent circumvention or evasion" of the Act, provided in 12 C.F.R. § 226.2(k) that the Act applies not only to transactions in which the finance charge is separately stated but also in which there is an agreement that the debt be payable "in more than 4 installments."

The decision of the court below to the effect that the Board exceeded its powers in adopting the multiple installment rule is based on the court's belief that owing to the definition of creditor in 15 U.S.C. § 1602(f) only creditors making a separate statement of finance charges are covered. Strong policy considerations calling for full disclosure of credit terms in all significant extensions of credit militate against the decision of the court below. Moreover, internal evidence within Truth in Lending shows the court erred in constraing the statute.

First, "finance charge" is defined as "the sum of all charges, payable directly or indirectly by the person to when the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit..." (15 U.S.C. § 1605(a).) (emphasis added). This all-inclusive definition hardly supports the Fifth Circuit's time that a creditor who buries his finance charge is not making a charge incident to the extension of credit.

Second, "credit sale" is defined as including: a he have

'lang contract in the form of a bailment or lease if the bailes or lease contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailes or leases will become, or for no other or a nominal consideration has the option to become, the owner of the property agon full compliance with his obligations under the contrast." 15 U.S.C. 6 1602(g).

The lease is the classic case in which no finance charge is separately stated; credit factors are commonly taken into consideration in fixing the rental payments. The definition of "credit sale" quoted above is largely based on Uniform Commercial Code Section 1-201(37) which determines when a lease is, in affect, a disguised sale and thus creates a security interest. It is worth noting that in the UCC cases in which leases were found to be disguised credit sales under UCC Section 1-201(37) no finance charges were separately stated. If the Fifth Circuit's assumption that the Act applies only to transactions in which a finance charge is separately stated, the quoted definition of "credit sale" would be emasculated for it would limit the applicability of the Act in lease cases to a virtually nonexistent transaction—leases is which finance charges are separately stated.

Furthermore, the legislative history of Truth in Lending tends to refute the Fifth Circuit's narrow view of the meaning of finance charge as one which is separately stated. Several years of hearings on proposed Truth in Lending bills repeatedly pointed up the possibility that enactment

See, e.g., In see Waker W. Willis, Inc., \$15 F. Supp. 1274 (N.D. Olike 1970); af a, 440 F.5d 1995 (6th Ch. 1971); In re-Oak Manufacture, inc., 6 UCC Real Serv. 1275 (8.D. N.Y. 1969); Searley v. Fabricators, Inc., 659 P.2dt 467 (Alaska 1969); United Rental Symposium Co. V. Forti & Callakia: Continuiting Co., 251 Md. 552, 191 A.3d 170 (1982).

such legislation could induce some creditors, particularly nose who rarely make cash sales, to pack the cost of credit ato the price of their product. It is significant that not ntil offer these hearings was the language "payable diffectly or indirectly by the person to whom credit is atended" added to the definition of finance charge in the version of the bill that was finally enacted. 15 U.S.C. 1605(a).

III. CONCLUSION

For these reasons, a writ of certiorari should issue to eview the opinion of the Fifth Circuit.

Respectfully submitted,

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^{*}See Hearings on S. 750 Before the Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency, with Cang., 1st & 2d Sens. (1963-1964), pp. 15, 208-209, 436-437, 500-501, 745, 744, 794, 1014-1015; Hearings on S. 5 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 20th Cang., 1st Sens., pp. 347-380, 513, 514-515, 600, 604-606, 699, 700-701 (1967).